IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.636 OF 2005
IN
COMPANY PETITION NO.204 OF 1994

Engineering Workers Association,
At Tel Rasayan Bhavan, Tilak Road,
Dadar, Mumbai 400 014. Applicant

versus

The Official Liquidator,
High Court, Bombay. Respondent

Ms.N.D.Buch i/by B.B.Dholkia for applicant.
Mr.Naushad Engineer for respondent.

CORAM : S.C.DHARMADHIKARI, J.
DATE OF RESERVING THE JUDGEMENT : 30.06.2006
DATE OF PRONOUNCING THE JUDGEMENT : 04.08.2006

JUDGEMENT :-

1. This company application by the applicant union seeks the following reliefs :-

(a) The Official Liquidator, High Court, Bombay being liquidator of M/s.Poysha Industrial Co.Ltd. (in liquidation) be directed by an order of this Hon'ble Court to re-adjudicate the claims of all the 121 employees with respect to following :-

(i) the statutory rate of interest on delayed payment of Gratuity under the Payment of Gratuity Act,

(ii) statutory bonus @ 8.33% for the period 1994-95, 1995-96, 1996-97 and

1997-98 as per Payment of Bonus Act,

(iii) To make contribution of employers share to the Provident Fund Authorities for the relevant period,

(b) That this Hon'ble Court be pleased to direct the Official Liquidator, High Court, Bombay to fully re-adjudicate the claims of the 21 employees (as per list annexed as Exhibit-E to Affidavit in Support hereof),

(c) For ad interim relief in terms of prayer (a), (i), (ii) and (iii), (b) above."

2. At the outset, Ms.Buch appearing for the applicant contends that order in terms of prayer clause (b) needs to be passed straight way. She invites my attention to a statement which is annexed at Annexure-E to the affidavit-in-support of this Company Application. She invites my attention to the discrepancies at sr.nos.1, 2 and 11 and submits that a person joining at a later stage with lesser basic salary/wages, has been granted larger amount. At sr.no.1. a person joining in 1970 and having basic wage more than those who have joined later has been denied a substantial sum.

3. Shri Engineer appearing for the Official Liquidator, on the other hand, states that this is a statement which is placed before me by the

applicant. It is not true that any discrepancies have occurred. He invites my attention to the statements in affidavit-in-reply and more particularly paras 16 to 18. However, in para 19 of this affidavit, this is what is stated :-

> "19. Official Liquidator submits that Counsel for workmen may be advised to submit sufficient documentary evidence showing the basic wage of workman at Serial No.1 namely Shri Laxman S Gaikwad was Rs.241.02 ps. so as to enable the Official Liquidator to readjudicate the claim."

4. In the light of the statement made in the company application which is supported by figures and in the light of contents of para 19 of the Official Liquidator's reply, in my view, interest of justice would be subserved if company application is made absolute in terms of prayer clause (b). There is no serious dispute as far as this relief is concerned. In any event, it is desirable that the Official Liquidator re-adjudicates the claim. However, the ambit and scope of readjudication and admissibility of claims before the Official Liquidator is the real issue.

5. Ms.Buch is pressing prayer clause (a) and in

that behalf she submits that the applicant union filed an affidavit dated 28th January 2002 in proof of debts along with detailed statement of 121 employees of the company in winding-up. All details were furnished. The Official Liquidator held several meetings for the purpose of adjudication of the claim and representatives of the applicant remained present at the meetings. She then relies upon the Minutes and submits that the adjudication of claims in respect of Salary, Gratuity, Retrenchment Compensation, Leave Salary, Provident Fund Contribution, LTC, Restored D.A., Bonus and notice pay has been done. She submits that upon adjudication the Official Liquidator has disallowed the claim of interest in respect of gratuity though the Payment of Gratuity Act, 1972 provides for the same. Similarly, as far as Provident Fund contribution is concerned, the Liquidator has observed that the workers must take up the matter with the Provident Fund authorities.

6. She submits that as far as claim for bonus is concerned, it has been allowed only for a period of one year though the employees had claimed bonus for the years 1994-95, 1995-96, 1996-97 and 1997-98. She submits that the Liquidator has

failed to follow the mandate of Sections 7(3A) and 8 of the Payment of Gratuity Act. She submits that payment of interest is required to be made under the statutory provisions, and, therefore, the Official Liquidator could not have disallowed the same.

7. She submits that even the claim for bonus could not have been disallowed. She submits that the relationship as employer- employee is deemed to have come to an end on the date of passing of the winding-up order by this Court i.e. on 9th January 1998. The date of closure of the unit was 1st May 1994 and hence bonus was claimed for a period of four years. It is submitted that the Official Liquidator has allowed the claim for salary for the above period on the basis that master-servant relationship ended only on 9th January 1998. Therefore, by the same logic, the payment of bonus ought to have been also made by allowing the claim in that behalf. She submits that bonus @ 8.33% is a statutory payment under the Payment of Bonus Act, and, therefore, the payment was justified.

8. Insofar as Provident Fund claim is concerned, her submission is that the claim could not have

been rejected or in any event the Liquidator was bound to make good the employer's contribution from the funds available with him after disposal of assets.

9. She has invited my attention to the relevant provisions of Payment of Gratuity Act, Industrial Disputes Act, Payment of Bonus Act as also Companies Act in support of her above submissions.

10. On the other hand, Shri Engineer - learned counsel appearing for the Official Liquidator submits that the action of the Liquidator, in this case, cannot be faulted. He submits that the Official Liquidator has in consonance with the provisions contained in the Companies Act, Companies (Court) Rules, 1959, rightly disallowed the claim for interest on Gratuity so also Bonus. He submits that by inadvertence if the claim for bonus for one year has been allowed, that would not make any difference to the legal position. Legal position is that when a company is wound up and liquidation proceedings are in progress, then, till dissolution of the company, the liquidator has to be in-charge of the assets and properties. This is for effective completion of

the process contemplated by law. Every single claim as against the company in liquidation has to be placed before the Liquidator and he has been given power to adjudicate the same. The Legislature while enacting the Companies Act, 1956 and subsequently amending the same in the year 1985, was fully conscious and aware of the fact that the workers' dues must also be paid off from the funds available after the sale of assets and properties of the company in liquidation. Being aware of the liability of workers as also the claims of secured creditors, the Legislature has placed them on par with each other. After 1985 the words "Pari Passu" have been used advisedly. The claims of secured creditors and workers are on par with each other but in some cases only. Shri Engineer submits that the Legislature thought it fit not to saddle the Liquidator with all claims of workers. It has deliberately used the term "Workmens' Dues". The said term has been defined specifically. Therefore, no assistance can be taken of the provisions of Industrial Law to either compute or award the dues of workmen. So much of the workmens dues as is covered by the definition of the said term appearing in Section 529(3)(b) alone is admissible and payable by the

liquidator. Therefore, other sums due and payable, cannot be claimed from the liquidator. There is a reason for this inasmuch as the liquidator has to make an attempt and meet all types of liabilities and claims, if not in full, at least partially. If all types of claims and liabilities of the company in liquidation are adjudicated, then special treatment cannot be given to some claims. Even in this aspect, the Legislature has made a departure in the year 1985 and introduced Section 529-A which provides for overriding preferential payments and in that behalf my attention has been invited by Shri Engineer to sub section 2 of Section 529A.

11. In his submission, even when the workmens dues have been given preference and override certain other payments, yet, not all dues of the workmen are included in the said term. The term has been defined for the purposes of this preferential payment so as to exclude certain dues of workmen. He submits that such dues which have no relation with services rendered to the company and for which alone appropriate payment/ reimbursement has to be made, are included in the definition. At the same time, a provision is made for the survival of the workmen by including

sums due towards Provident Fund, Pension Fund, Gratuity Fund or any other fund maintained by the company for their welfare. Therefore, according to him, a balancing act has been performed by the Legislature. In these circumstances, it would be unfair to make payment of dues pertaining to workmen which are outside the purview of the above definition. That would render the provisions nugatory and redundant. Hence, gratuity has to be paid but merely because the concept of gratuity is covered in workmens dues, that does not mean that even interest for delayed payment under the Payment of Gratuity Act can be recovered or claimed from the Liquidator.

12. In the same way, their claim for bonus, is not admissible. The term "workmens dues" means the aggregate of the sums due from the company to it’s workmen namely all wages or salary as contemplated by Section 529(3)(b)(i). The reference therein is to the Industrial Disputes Act, 1947. If the argument of the applicant that Gratuity contemplated by definition of "workmens dues" means the Gratuity contemplated by Payment of Gratuity Act is accepted, then the same analogy will have to be applied and the term "Wages" as defined and understood by the

Industrial Disputes Act, would have to be taken into consideration. That definition {Section 2(rr)} specifically excludes "Bonus" as also any gratuity and any contribution payable by the employer in the pension fund or provident fund. Therefore, it is not possible to accede and accept this contention of the applicant.

13. In any event, according to Shri Engineer, bonus is not at all contemplated, and, therefore, that payment cannot be made. In his submission, as far as Provident Fund is concerned, the workmen will have to apply to the Provident Fund authorities and if the applicant can also so apply, then the Liquidator would render all assistance to them. This is the correct approach. The Liquidator has not denied that liability. For all these reasons he submits that the company application be dismissed.

14. In support of his contentions, Shri Engineer has relied upon judgement of a learned Single Judge of Gujarat High Court reported in Vol.99-Company Cases-189 (Textile Labour Association Vs. Official Liquidator of Jubilee Mills Ltd.), as also a judgement of Kerala High Court reported in (1998)5-Company Law Journal-

383 (Mattoor Chits and Finance (P) Ltd. Vs. Mrs.Mary Baby). In this application, I am considering a case where the Official Liquidator is appointed pursuant to a winding up order passed by this Court on 9th January 1998. During the proceedings before the Official Liquidator it is stated that the unit is closed from 1st May 1994. Therefore, this is a case where the Liquidator is not called upon to run the factory or continue the business of the company in liquidation. The Liquidator is appointed to wind up and ultimately dissolve the company in liquidation. This aspect will have a great bearing on the ultimate conclusions reached in this judgement.

15. With the assistance of Ms.Buch and Shri Engineer I have perused the company application and the annexures thereto as also the affidavit in reply. I have perused the relevant provisions and the decisions brought to my notice.

16. In the affidavit in reply filed on 15th December 2005, the Official Liquidator has pointed out that by an order dated 9th January 1998 passed in Company Petition No.2004/1994, the Company M/s.Poysha Industrial Co. Limited has

been wound up and the Official Liquidator has been appointed as the Liquidator with usual powers under the Companies Act, 1956. The Liquidator has taken possession of the movable and immovable properties, which are situate at various places. He has disposed of several properties, immovable and movable, belonging to the company in liquidation and details of the properties remaining to be disposed off, are set out in para 4 of the same.

17. He has pointed out that in pursuance of the orders of this Court he received total number 1,563 claims from workmen, Sales Tax Department, secured creditors, preferential creditors and others. In para 7 of the affidavit in reply, this is what is stated by the Official Liquidator:-

> 07. That out of the above claims the Official Liquidator has adjudicated and admitted the claims of 1279 Workmen and the Certified List of 1269 Workmen alongwith 1st Supplementary List of 10 Workmen has been filed with the Prothonotary & Senior Master, High Court Bombay on 31st March 2004 and 17th November 2004 respectively aggregating to a sum of Rs.28,45,34,968/- (Rupees Twenty Eight Crores Forty Five Lakhs Thirty Four Thousand Nine Hundred Sixty Eight only) and Rs.16,93,913/- (Rupees Sixteen Lakhs Ninety Three Thousand Nine Hundred

Thirteen only) totalling to a sum of Rs.28,62,28,881/- (Rupees Twenty Eight Crores Sixty Two Lakhs Twenty Eight Thousand Eight Hundred Eighty One only).

He has pointed out that a view has been taken by this Court with regard to priority to be given to the Sales Tax dues on par with the dues of workmen and secured creditors. However, there are no claims of the Sales Tax Department. In the affidavit he has pointed out the names of secured creditors and correspondence with them for ascertaining the details of their claim. He points out that he is at present having a sum of Rs.6.17 crores available to the credit of the company in liquidation and in addition to that, a sum of Rs.4.50 crores which have already been deposited with the banks and financial institutions, details of which are also enlisted in para 11 of the affidavit.

18. In para 14 of the affidavit he has enlisted the procedure which he has followed while adjudicating the claims of the workmen. However, since the direction is now issued to readjudicate the claims of 21 workmen by consent, this aspect need not be gone into in details. Even otherwise, there is no quarrel or dispute raised

before me with regard to the procedure adopted by the Official Liquidator. As far as interest on delayed payment of gratuity is concerned, the Liquidator in para 15 of this affidavit states thus :-

> "15. With reference to the averments made in para 10 of the affidavit, I say that the interest on delayed payment of gratuity can be considered in terms of Rule 179 of the Companies (Court) Rules, 1959 as and when any surplus funds are available with the Official Liquidator."

19. As far as Provident Fund dues is concerned, he has contended that the P.F. Authority will have to lodge its claim with the Official Liquidator in prescribed form and he states that prescribed form is Form No.46. This is in substance his stand in the matter.

20. For properly appreciating the rival contentions, a reference will have to be made to Sections 528, 529 and 529A of the Companies Act. Chapter-V of Companies Act in which these sections find place is a chapter which contains provisions applicable to every mode of winding up. There is a sub heading before Section 528 and it is entitled proof and ranking of claims.

Section 528 provides the debts of all descriptions to be admitted to proof. This provision reads thus:-

> "S.528 : Debts of all descriptions to be admitted to proof.-
>
> In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of insolvency), all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value."

A bare reading of the same would make it clear that although all debts and claims against the company shall be admissible to proof against the company, it does not mean that the Liquidator is bound to honour such dues and claims. That would be clear on reading of latter part of Section 528. A just estimate has to be made so far as possible of the value of such dues or claims which are contingent or which are in the nature of damages or for some other reason, may not bear a certain value.

21. Section 529 as it originally stood, did not have any provision which would equate the dues of workmen with that of a secured creditor. However, with the introduction of Section 529A of the Companies (Amendment) Act, 1985 (for short referred to as the "Amending Act"), a proviso has been incorporated below sub section 1 of section 529. Section 529 after amendment reads thus :-

> "S.529 - Application of insolvency rules in winding up of insolvent companies.-
>
> (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-
>
> (a) debts provable;
>
> (b) the valuation of annuities and future and contingent liabilities; and
>
> (c) the respective rights of secured and unsecured creditors;
>
> as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent :
>
> (Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,-
>
> (a) the liquidator shall be entitled to represent the workmen and enforce such charge;
>
> (b) any amount realised by the liquidator by way of enforcement of such charge

shall be applied rateably for the discharge of workmen’s dues; and

(c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen’s portion in his security, whichever is less, shall rank pari passu with the workmen’s dues for the purposes of section 529A).

(2) All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section :

(Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realise his security, he shall be liable to pay his portion of the expenses incurred by the liquidator including a provisional liquidator, if any for the preservation of the security before its realization by the secured creditor.

Explanation : For the purposes of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the workmen’s portion in relation to the security bears to the value of the security.

(3) For the purposes of this section, Section 529A and Section 530,-

(a) "workmen" in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen’s dues" in relation to a company, means the aggregate of the

following sums due from the company to its workmen, namely:-

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman, in respect of service rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, on the termination of his employment before, or by the effect of, the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen’s Compensation Act, 1923 (8 of 1923), rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) "workmen’s portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen’s dues bears to the aggregate of-

(i) the amount of workmen’s dues; and

(ii) the amounts of the debts due to the secured creditors."

22. Thus, after amendment the security of every secured creditor is deemed to be subject to a pari passu charge in favour of workmen to the extent of workmen portion therein. A secured creditor has an option of realising the security or relinquishing it and prove his debt. However, if he opts to realise a security, then he has to abide by the mandate of proviso to sub section 1 of Section 529. When Section 529A was introduced, an amendment was also made to Section 530. It then became necessary to define the terms "workmen, workmens dues and workmens portion". Section 529A providing over-riding preferential payments, reads thus:-

> "S.529A - Overriding preferential payments.-
>
> (1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-
>
> (a) workmen’s dues; and
>
> (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of sub section 529 pari passu with such dues,
>
> shall be paid in priority to all other debts.
>
> (2) The debts payable under clause (a) and clause (b) of sub section (1) shall

> be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions."

23. A bare reading of this provision would indicate that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company, workmens dues and dues of secured creditors to the extent such debts rank under clause (c) of the proviso to sub section 1 of section 529, pari passu with such dues shall be paid in priority to all other debts. However, sub section 2 clearly demonstrates that even if such priority is given to the debts of workmen and debts due to secured creditors, still they are not payable in full. An endeavour has to be made to make full payment but if the assets are insufficient to meet the dues they abate in equal proportions. Further, if reference is made to Section 530(1)(b), there also, emphasis is given to the dues towards wages or salary, but here the word "workmen" is not there. Now, workmen, as defined under the Industrial Disputes Act, are covered by the amended provisions whereas Section 530(1)(b) speaks of "employee".

24. A comparison with Section 529(3)(b) and Section 530(1)(b)(ii)(f) would demonstrate that the dues contemplated by both provisions are more or less identical. The words used in section are "means" and not "includes". It is well settled that when an expression "means" is used, it is exhaustive in nature.

25. There is no reference in these provisions to Bonus admittedly. The reason for the same appears to be obvious. The intention is to honour and meet the dues of the workmen towards wages or salaries or such compensation which is admissible to him for services rendered to the company and payable under the provisions of Industrial Disputes Act, 1947. Similarly, whenever the Legislature thought that dues other than wages or salary are payable as workmens dues, it has included them, such as, all accrued holiday remuneration payable to any workman or in case of his death to any person in his right, on the termination of his employment before or by the effect of winding up order or resolution. Further, if the company is wound up voluntarily, merely for the purpose of reconstruction or amalgamation in another company or unless the company at the commencement of winding up has

under a contract with the Insurers, as is mentioned in Section 14 of the Workmens Compensation Act, 1923, rights capable of being transferred and vested in the workmen, then, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of death or disability of any workmen, are also included in workmens dues. At the same time, sums due to any workmen from a Provident Fund, Pension Fund, Gratuity Fund and/or any other fund for the welfare of the workers maintained by the company, are also included. Thus, workmens dues being ranked higher in priority have been defined with a view to obviate payment of all sums due to them. Such of the sums which as a part of the welfare measure and consistent with the concept of a living wage have been included. So also, compensation for injury in voluntary winding up or under contract of insurance is also included. Thus, the intention is to award monies due for services rendered and remuneration earned as of right so also death or disablement compensation or terminal dues, should be paid so that the workmen does not suffer adversely because of winding up. Some what similar view has been taken in a case reported in 1952(22)-Company Cases-96. Here, the view taken

is, that Bonus is not included under the category of "Wages" in Section 230 of the old Companies Act and workers are not entitled to preferential payment of bonus. The decision was in the field when the Act was amended. The legislature in its wisdom has not included ‘Bonus’ even in the amended provision. This is indicative of the intention of the Legislature.

26. It is common ground that upon a petition or application for winding up made voluntarily or otherwise wherein an order is made for winding up, it’s effect is that it operates in favour of all creditors and all the contributories of the company as if it had been made on the joint petition of a creditor or of a contributory. When such is the effect of winding up order, naturally, the Court supervises and monitors the process of winding up till the company is dissolved. During this process it appoints the Official Liquidator and directs him to take charge of the assets and properties. Once he is appointed, then his powers are defined and which include taking over possession of assets and properties. However, he exercises such powers with the sanction of court. When the company is directed to be wound up, as in this case, and

Official Liquidator has been appointed, then the act postulates that the Liquidator shall not be saddled with all types of liabilities and dues of the creditors or contributories. A claim can of course be made against Official Liquidator but the Companies Act does not oblige him to honour every claim in full even if it is proved. It is not disputed that when a company is directed to be wound up and a liquidator is appointed to take charge of its affairs, then while he is holding charge, he cannot be expected to honour every commitment and meet every liability as if he is in charge of the management of the company and carrying on its business. The affairs are handed over to him and he is incharge of the same for the purposes of winding up. In such circumstances and when it is not possible to revive the company and it’s affairs have to be wound up completely so as to dissolve it, then a liquidator cannot be directed to make payment to creditors as if the company is operational and functional. In other words, when the company is not in liquidation, then all creditors can recover their monies from it in accordance with law, but, when it is wound up and in charge of the liquidator, then the position is altogether different. This vital and fundamental

distinction has to be borne in mind and that is recognised by law.

27. Section 529A and the amendments of 1985 were necessitated because of the fact that workmens dues were not getting priority until then. They had to wait for years together and endlessly in the queue along with unsecured creditors. The payment would be made to them pro-rata or proportionately. That payment was not enough for them to survive. If they are to survive and not starve, then the Legislature had to step in. It stepped in and inserted the provisions referred to above. Statements of objects and reasons, in this behalf, read thus:-

> "... ... ... Another announcement made by the Finance Minister in his Budget speech relates to the decision of the Government to introduce necessary legislation so that legitimate dues of workers rank pari passu with secured creditors in the event of closure of the company and above even the dues to Government. The resources of companies constitute a major segment of the material resources of the community and common good demands that the ownership and control of the resources of every company are so distributed that in the unfortunate event of its liquidation, workers, whose labour and effort constitute an invisible but easily perceivable part of the capital of the company are not deprived of their legitimate right to participate in the

> product of their labour and effort. it is accordingly proposed to amend sections 529 and 530 of the Companies Act and also to incorporate a new section in the Act, namely section 529A (vide clauses 4, 5 and 6 of the Bill)."

28. A Three Judge Bench of Hon'ble Supreme Court had to resolve a conflict of views between Two Judgements both rendered by a Bench of two learned Judges and with regard to workmens dues and over-riding preferential payments. Resolving this conflict, the Supreme Court observes thus :-

> "AIR-2005-SC-1814 - Andhra Bank Vs. Official Liquidator and another :-
>
> 21. In terms of the aforementioned provisions, the secured creditors have two options (i) they may desire to go before the Company Judge; or (ii) they may stand outside the winding up proceedings. The secured creditors of the second category, however, would come within the purview of Section 529(A)(1)(b) read with proviso (c) appended to Section 529(1). The 'Workmen's portion' as contained in proviso (c) of sub section (3) of Section 529 in relation to the security of any secured creditor means the amount which bears to the value of the security in the same proportion as the amount of the workmen's dues bears to the aggregate of (a) workmen's due and (b) the amount of the debts due to all the creditors. The submission of Mr.Gupta is that in a situation of this nature, what was necessary to be considered by the learned single Judge was to find out the amount in relation whereto the appellant was raising its claim as a secured creditor, namely, 135 lakhs vis-a-vis the aggregate

of the amount of the workmen’s dues of 19 crores and the claim of any other secured creditor was not required to be taken into consideration. We cannot accept the said contention. The illustration appended to clause (c) of sub section (3) of Section 529 is a clear pointer to the effect that the amount of debts due to the secured creditors should be taken into consideration for the purpose of ascertaining the workmen’s portion of security.

22. The language of Section 529-A is also clear and unequivocal, in terms whereo fthe workmen’s due or the debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to sub section (1) of Section 529 pari passu with such dues shall have priority over all other debts. Once the workmen’s portion is worked out in terms of proviso (c) of sub section (1) of Section 529, indisputably the claim of the workmen as also the secured creditors will have to be paid in terms of Section 529-A. This Court in Allahabad Bank (supra) held:

> "Learned Attorney General on the other hand submitted that the first part of clause (c) of the proviso to Section 529(1) is to be read along with the words "or the amount of the workmen’s portion in his security, whichever is less". IN other words, the priority of the secured creditor is only to the extent that any part of the said security is lost in favour of the workmen consequent to demands made by the liquidator under clauses (a). (b) or the said proviso to Section 529(1). No such situation has arisen so far. It is contended that where a secured creditor keeps himself outside as stated in the proviso to Section 529(1) and seeks to recover his dues outside the Company Court, if he loses part of his security towards workmen’s

> dues, he gets reimbursed to that extent as a secured creditor, with an overriding priority under Section 529(A)(1)(b). He gets priority over all other creditors before the Tribunal, to be compensated for this loss out of the monies that may have been realised at the instance of other creditors before the Tribunal. It is pointed out that Canara Bank has neither realised any amount outside winding up nor has it lost any part of its security towards workmen's dues. In our view, this contention of the learned Attorney General is well founded and is entitled to be accepted.
>
> In our opinion, the words "so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso" obviously mean the amount taken away from the private realisation of the secured creditor by the liquidator by way of enforcing the charge for workmen's dues under clause (c) of the proviso to section 529(1) "rateably" against each secured creditor. To that extent, the secured creditor - who has stood outside the winding up and who has lost a part, of the monies otherwise covered by, security - can come before the Tribunal to reimburse himself from out of other monies available in the Tribunal, claiming priority over all creditors, by virtue of Section 529(A)(1)(b)."

23. This Court emphasized that whatever secured creditor loses towards the workmen's portion out of the security, he can claim the same amount with priority over such unsecured creditors out of realization made by other creditors whose moneys are lying in the Tribunal.

> 24. While determining the Point No.6, however, a stray observation was made to the effect that the "workmen's dues" have priority over all other creditors, secured and unsecured because of Section 529(A)(1)(a). Such a question did not arise in the case as the Allahabad Bank was indisputably an unsecured creditor.
>
> 25. Such an observation was, thus, neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and unambiguous language contained in Sec.529(A)(1)(a). We have, therefore, no hesitation in holding tyhat finding of this Court in Allahabad Bank (supra) to the aforementioned extent does not lay down the correct law."

My view, as stated above, as also the statutory provisions finds support in the observations of Hon'ble Supreme Court in a case reported in AIR-2006-SC-2088 (ICICI Bank Ltd. Vs. SIDCO Leather Ltd. & ors.). In para 37 of this judgement the Supreme Court referred to the object and principles of enacting Section 529A.

29. In this behalf, the learned Single Judge of the Gujarat High Court in the decision relied upon by Shri Engineer observes thus :-

> "The definition of "workmen's dues" in section 529(3)(b) is not an inclusive definition. All the items which are required to be included in "workmen's dues" are specifically enumerated. The Legislature has referred only to the provisions of the Industrial Disputes Act in the relevant sub-clauses of section

529(3)(b) and has not made any reference to the Payment of Wages Act. If the Legislature had intended that the wages

as defined by the Payment of Wages Act were intended to be covered, the Legislature would not have provided for separate sub clauses for accrued holiday remuneration and gratuity as all these items are already covered by the definition of "wages" in section 2(vi)(b) and (d) under the Payment of Wages Act. The very fact that the Legislature has made separate provisions for these items indicates that the Legislature was adopting the narrower definition of "wages" under the Industrial Disputes Act and, therefore, gratuity, pension and provident fund which are specifically excluded from the definition of "wages" under the Industrial Disputes Act, are separately provided for in sections 529(3)(b) and 530 of the Companies Act.

Moreover, when the Legislature has given the workmen's dues (as defined in section 529(3)(b)) along with the dues of the secured creditors overriding priority even over the dues mentioned in section 539(1) of the Act including dues payable to the employees (i.e. other than workmen-see section 539(8)(bb)), the Legislature must be treated to have consciously accepted the narrower definition of the term "wages" under the Industrial Disputes Act. The exclusion of "any bonus" from the definition of wages under the Industrial Disputes Act would also indicate that bonus is excluded whether payable under the provisions of the Payment of Bonus Act, 1965, or by the terms of the contract of the employment de hors the provisions of the Payment of Bonus Act.

The following pertinent observations made by the Division Bench (Coram : Hon'ble the Chief Justice Mr.Kotwal and Hon'ble Mr.Justice Palekar) in the case reported in D.P.Kelkar v. Ambadas Keshav Bajaj, AIR 1971 Bom 124, would go to show that bonus is not a part of the wages, as ordinarily understood (headnote).

"When a payment, whether called bonus or not, is such that it can hardly be called remuneration, it would not be included under the definition of "wages". By the Payment of Bonus Act a term of the employment has been introduced binding on the employer and in favour of the employee to pay bonus. The expression "term of employment" or "under the terms of employment" used in section 2(vi) cannot be read to imply merely contractual terms of employment. The bonus payable under the Payment of Bonus Act, 1965, amounts to "wages" within the definition in section 2(iv)."

In none of the cases cited at the Bar, the court was concerned with the question whether "bonus" would fall within the definition of "workmen's dues" for the purpose of priority under section 529(3)(b) of the Companies Act. The earlier decisions which interpreted the term "wages" in section 530(1) of the Companies Act, 1956, or in Section 230 of the Indian Companies Act, 1913, cannot be considered to be relevant after the amendments made in the Companies Act in 1985, inter alia, inserting sub-section (3) in section 520 and inserting section 529A in the Act as discussed above. Section 529(3)(a) inserting the definition of "workmen" with reference to the Industrial Disputes Act and clause (i) in section 529(3)(b) making specific reference to compensation payable under the Industrial Disputes Act must be held to be crucial in determining the legislative intent of referring to the Industrial Disputes Act as the guiding statute and, therefore, relying on the narrower definition of "wages" under the Industrial Disputes Act and not the wider definition of "wages" under the Payment of Wages Act.

The Court, therefore, holds that the expression "all wages or salary" in section 529(3)(b) does not include bonus payable to the workmen under the Payment of Bonus Act or otherwise."

The submissions of Ms.Buch proceed on the basis that dues of workman as per Industrial Law or under welfare and beneficial legislations are necessarily protected and claims in that behalf have to be honoured even if the company is in winding up. Inspite of full sympathy for the workmen, it is not possible to accept this contention because it is not as if the dues are not payable generally but when it comes to claiming the amounts from the funds in the hands of liquidator, that the Legislature has enlisted the dues specifically. Once the workmen are claiming priority over other creditors or contributories, and anxiety is that their claims should be expeditiously settled, then, they have to abide by the special provisions enacted to give priority to their dues. The workmen can always come for their dues with others. However, for adjudication thereof they will have to stand in line with others. Her argument overlooks this basic distinction. It is not as if the workmen cannot have any remedy for the dues which is not covered by the definition "workmens dues" as referred to above. However, as observed above, for such claims, they must join others and wait for adjudication and settlement.

30. If all these aspects are considered, then there is much substance in the contentions of Shri Engineer that the Liquidator cannot be called upon to pay the bonus and honour the claim in that behalf. As far as payment of interest on gratuity is concerned, the Payment of Gratuity Act, 1972 has not defined the term "Gratuity". A plain and ordinary meaning of the said term is :-

> The Concise Oxford Dictionary :-
>
> "Gratuity" (noun) - money present or amount fixed by giver in recognition of an inferior's good offices, tip, bounty to soldier etc. on demobilization or retirement or some other occasions, gift
>
> Money given in recognition of services rendered.
>
> Lump sum paid (in addition to Pension) to a retiring employee, specially under Civil Services."

What the Act contemplates is payment of Gratuity on termination of employment for continuous service rendered for a period specified therein. Now, such a Gratuity has to be paid is the mandate. The Gratuity has to be determined in case of eligible persons initially on the written application of the employee by the employer. He has to give notice in writing to the person to

whom the Gratuity is payable and also to the controlling authority specifying the amount of gratuity determined. The employer then has to arrange payment within 30 days from the date it has become payable to the persons to whom it is to be paid. If the gratuity is not paid after such determination by the employer within the period specified above, then there is payment of simple interest not exceeding the rate notified by the Central Government from time to time for repayment of long term deposits as may be specified by the Government. This is what is relied upon by Ms.Buch {Section 7(3A)}. However, she has not referred to the term "employer" as defined in Section 2(f). That provision reads thus :-

> "S.2(f) of The Payment of Gratuity Act, 1972 :-
>
> "employer" means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop-
>
> (i) belonging to, or under the control of, the Central Government or a State Government a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed, the head of the Ministry or Department concerned,
>
> (ii) belonging to, or under the control

> of, any local authority, the person appointed by such authority for the supervision and control of employees or where no person has been so appointed, the chief executive officer of the local authority,
>
> (iii) in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person;"

In this case it is not the contention of Ms.Buch that liquidator can be said to be the employer. The employer is the company in liquidation. That employer is obliged to make the payment within the period specified if the gratuity becomes payable. It is that employer, who upon delay, is charged with the liability to pay the interest. If application is made but payment of gratuity is not made by the employer even after its determination, then that employer (company in liquidation) can be called upon to make payment of interest. However, if the company is in winding up and a liquidator is appointed then it is difficult to hold that the law expects the liquidator to make payment of interest for delayed payment of gratuity by the employer. The liquidator has to see to it that the workmen get

sums due to them from Provident Fund, Pension Fund, Gratuity Fund or any other fund for the welfare of the workmen, maintained by the company. If the liquidator steps in after winding up order is passed and is expected to adjudicate on the claim which is made by a workman for payment of sums out of a fund of such nature, then if interpretation of Ms.Buch is accepted, interest will have to be paid as a matter of course and as of right to the workman concerned. It is not disputed by her that liability to pay interest accrues on delayed payment of Provident Fund as well. If there is a delay in payment of that fund, then interest would be payable even for the same. Similarly, if Pension Rules and Regulations provide for payment of interest on delayed pension or if the law laid down by Hon’ble Supreme Court has to be applied, then interest has to be paid on delayed payment of pension as well.

31. Therefore, when a winding up order is made, a claim is lodged and liquidator seeks proof thereof and upon furnishing of proof adjudicates the claim, then the liability to pay gratuity from the fund maintained by the employer or otherwise in law, cannot be denied but liquidator

cannot be called upon to pay interest straight way. Miss Buch's submission overlook the statutory provision. The Liquidator's obligation is to make payment of all sums due to any workman from an Existing Gratuity Fund maintained by the company. Thus, sums due from the fund have to be released upon proof and adjudication by the Liquidator. This exercise of releasing something from an accumulated fund, cannot be equated with the exercise under the Payment of Gratuity Act. However, as observed by the Gujarat High Court, if there is no fund, then the Liquidator will have to determine Gratuity payable as per the Payment of Gratuity Act, 1972. In such an eventuality, can he be called upon to pay interest u/s 7(3A) of the Gratuity Act, is the moot question. In other words, should Section 7(3A) of the Gratuity Act be read into the Companies Act. The answer will have to be in the negative. Liquidator may determine the Gratuity payable under the Gratuity Act. That is because the intent is not to deprive the workman of Gratuity, Pension and Provident Fund after the company is would up. In this behalf provisions of Section 4 of the Gratuity Act cannot be overlooked. It reads thus:-

"4. Payment of gratuity.-

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement :

(Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.)

Explanation.- For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned :

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total

wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account :

Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation.- In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed three lakhs and fifty thousand rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as to reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer' shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee

may be wholly or partially forefeited -

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years on his superannuation, retirement or resignation or death or disablement due to accident or disease. Section 7 provides for determination of the amount of Gratuity. There is no outer limit for determination. The only obligation is to pay within thirty (30) days thereof failing which the same carries interest. Gratuity has to be payable. It becomes so only after Official Liquidator determines it. In other words, when the procedure set out under the Companies Act has to be adopted in cases of winding up and appointment of liquidator, then for the delay in determination and payment of gratuity by the employer, the liquidator cannot be called upon to pay interest on priority basis,

as of right. The liquidator steps in only after winding up. He may step in before that but that is provisional. Hence in a given case even before the winding up order, a liquidator can be appointed provisionally. But then the employer continues. The business of the company may be closed. Establishment may not be working or functional but there is no winding up. If Ms.Buch's interpretation is to be accepted, then even for such a period, interest may be demanded as of right from the liquidator.

32. In my view, considering the nature of the payment and the obligation cast upon the employer so also the role of the liquidator in winding up, payment of interest as contemplated by Section 7(3A) is not ipso facto covered under the term "all sums due to any workman from a gratuity fund" appearing in Section 529(3)(b)(iv) of the Companies Act, 1956. After the Liquidator determines gratuity under section 7 of the Gratuity Act and does not pay the amount within thirty days from the date of determination, even then, interest cannot be claimed under section 7(3A) but under general law. It can be claimed under Rules 156 and 179 of the Companies (Court) Rules, 1959 which read thus:-

> "156. Interest.- on any debt or certain sum payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the winding-up order, or the resolution as the case may be, the creditor may prove for interest at a rate not exceeding four per cent per annum up to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of demand until the time of payment.
>
> 179. Payment of subsequent interest.- In the event of there being a surplus after payment in full of all the claims admitted to proof, creditors whose proofs have been admitted shall be paid interest from the date of the winding-up order or of the resolution as the case may be, up to the date of the declaration of the final dividend, at a rate not exceeding 4 per cent per annum, on the admitted amount of the claim after adjusting against the said amount the dividends declared as on the date of the declaration of each dividend."

33. However, considering the statement made on affidavit by the liquidator, I am not rejecting the claim for interest at this stage and it would be open for the applicant to claim the same subsequently. The liquidator may consider the claim on its own merits and in accordance with law. All that I am holding is that the mandate of Section 7(3A) of the Payment of Gratuity Act,

1972 cannot be straight way read into with abovementioned provisions of Companies Act and more particularly for directing payment of interest contemplated by the Gratuity Act by the liquidator.

34. As far as Section 8 of Payment of Gratuity Act is concerned, that is a remedy to recover the gratuity as arrears of land revenue and the interest contemplated therein is in a certificate to be issued by the controlling authority. The Collector is the authority for recovery of land revenue. The interest is to be a compound interest at the rates specified in a notification in that behalf issued by the Central Government. The interest is admissible only if a certificate for recovery of a dues as a public demand has been issued. The demand must be for recovery of sum of gratuity as arrears of land revenue. In the present case, neither is any certificate issued nor is any recovery initiated by the Collector. Therefore, this provision is of no assistance in the present case.

35. It cannot be forgotten that the Liquidator has to seek directions for making payment of adjudicated claims from the Company Court.

Therefore, it is not as if he is not making payment as understood in the case of an "Employer" under the Gratuity Act.

36. As far as Provident Fund is concerned, in my view, if that fund is maintained by the company, then the liquidator cannot deny his liability to pay sums accumulated in the same. In other words, it is workmens' dues and it is the duty of the liquidator to move the Provident Fund authorities if the fund is transferred to them for management and administration and assist the workmen in recovery of all contributions. The liquidator cannot leave the matter to the workmen or the applicant in this case. Even if the Provident Fund Commissioner has not moved any application in the prescribed form, the liquidator in the facts and circumstances of this case, must follow up the matter with the Provident Fund authorities and see to it that the amounts due and payable are deposited with him and ultimately paid to the workmen.

37. To enable the liquidator to move the Provident Fund Authorities, he is at liberty to seek such directions as are necessary from this Court. In any event, he must initiate steps for

recovery of Provident Fund dues in case they are not deposited with him already, within a period of six weeks from today.

38. Ms.Buch contends that the employee as well as employer's share constitutes the Provident Fund. Her submission is that the liquidator must make good the contribution in the fund as far as employer is concerned, as the employee-employer relationship continued till the winding-up order was passed. This is not a case of running industry which liquidator is expected to run and manage.

39. It is not possible to accept this contention for more than one reason. Firstly, under the term "workmen's dues" what is covered is the sums due from a Provident Fund or the pension fund or any other fund for the welfare of the workers maintained by the company. The sums due from this fund may be the contributions of both employer and employee, accumulated therein. That means accumulated till the date the winding up order is passed. The liquidator cannot be expected to make good any short fall or deficit because he is not an employer, as is understood by the applicant herein. In other words, when

the Provident Fund Act mandates creation of a fund consisting of deductions and contributions from employer-employees, it can never be the intention that a person like Liquidator is obliged to forward any contribution from the funds collected by him after disposal of the assets and properties of the company in liquidation. As has been explained above, the argument is misconceived because if the liquidator is not the employer, then merely because he steps in after a winding-up order is made, does not mean that after he has stepped in he should go on contributing to the Provident Fund on the basis that the relationship between the company in liquidation and the employee subsists or continues in law. The Liquidator cannot be expected to deposit any monies in such funds. He has to utilise the monies realised from sale and disposal of the assets and properties of the company in liquidation in the manner directed by company law. It was never intended therein that he should deposit any sums in the funds. Nothing is pointed out to me which would indicate any obligation of this nature. All that can be expected from the Liquidator is to assist the workmen in realising the sums due to them from the Provident Fund and that

expectation will have to be fulfilled by the Liquidator. That he fulfils such an expectation of the applicant and other employees, is something which has been achieved by my directions issued to him. In these circumstances, the request to direct the Liquidator to make contribution of employer's share to the Provident Fund Authorities for the relevant period, cannot be granted and it is hereby rejected.

40. My view finds support in a reported decision. Some what identical view was taken by a learned Single Judge of Calcutta High Court in AIR-1960-Cal.-19 (in the matter of Mahalaxmi Cotton Mills Ltd.) (in Liquidation). After referring to the provisions of the old Act and Section 530 of the 1956 Act, the Court proceeded to observe thus:-

> "13. On behalf of the Official Liquidator reference was also made to S.11 of the Employees' Provident Funds Act to show that priority of payment of contributions over other debts is accorded only where the liability accrued before the Company was wound up. That is the priority of pre-liquidation contribution. It is, therefore, said that the Statute makes no provision for post-liquidation contribution. Now S.11 of the Employees' Provident Funds Act

expressly refers to S.230 of the Companies Act. Section 230 of the Companies Act deals with preferential payments. It sets out the payments of certain amounts in priority to all other debts. In that list in sub-clause (3) is mentioned "all sums due to any employee from a Provident Fund, a Pension Fund, a Gratuity Fund or any other fund for the welfare of the employees maintained by the Company." That, again, means that sums already due to an employee will have priority. This, again, does not deal with post-liquidation liabilities. Reference to S.11 of the Employees' Provident Funds Act and S.230 of the Companies Act for preferential payments does not help the argument of the Official Liquidator that this contribution to the Provident Fund should not be made by him although he has been asked to continue the factory engaged in the industry and to keep it going and to sell it as a going concern. These liabilities are not liabilities for preferential payments, but they are statutory and indispensable liabilities such as the many liabilities which a Liquidator has to undertake, as for instance, as when he is to continue a lease to keep on paying the rent or where he is holding other properties, to see that rates and taxes in respect of them are paid.

14. Now what is going to be the result if the construction contended for by the Liquidator is adopted? Apart from creating a special class of persons who would be permitted to do business without the statutory liabilities enjoined in such business, there will be many other serious consequences. The Provident Fund will cease to exist, and in that event the workers may very well leave the factory. As a consequence, the business will not be able to sell the factory as a running concern which is the order of the Court.

15. I am, therefore, satisfied, both on the construction of the Employees' Provident Funds Act and its Scheme as

> well as on the special order made in this case directing the Liquidator to carry on the factory engaged in the industry and to sell it as a going concern, that the Liquidator is liable as an ‘employer’ and ‘occupier’ within the meaning of that Act to make the contributions required by the Statute and the Scheme framed thereunder.
>
> 16. I shall not be understood as holding that where the Liquidator is asked to wind up a factory and close it down, he would still be liable for contribution under this Act. In fact, I have already said that in such an event the Liquidator will not be liable under the Act for contribution because it will no longer be a factory "engaged" in the specified industry. In fact, it will then be disengaged from the industry and closed down."

No contrary view has been shown to me.

41. As far as Provident Fund is concerned, the Liquidator has been called upon by the applicant union to make contributions to the P.F.Fund of employees share for the relevant period i.e. 1st May 1994 to 9th January 1998. No reliance has been placed on any provision save and except Section 11 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. That provision is reading thus :-

> "11. Priority of payment of contributions over other debts.-
>
> (1) Where any employer is adjudicated

insolvent or, being a company, an order for winding up is made, the amount due -

(a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under section 14B, accumulations required to be transferred under sub section (2) of section 15 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or

(b) from the employer in relation to an exempted establishment in respect of any contribution to the provident fund or any insurance fund in so far it relates to exempted employees, under the rules of the provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under sub section (6) of section 17, damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under section 17.

shall, where the liability therefor has accrued before the order of adjudication or winding up is made, be deemed to be included among the debts which under section 49 of the Presidency-Towns Insolvency Act, 1909 (3 of 1909), or under section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under section 530 of the Companies Act, 1956 (1 of 1956) are to be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

(Explanation.- In this sub section and in

> section 17, "insurance fund" means any fund established by an employer under any scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.)
>
> (2) Without prejudice to the provisions of sub section (1), if any amount is due from an employer whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being force, be paid in priority to all other debts.)

42. In other words, this provision means that upon an employer being a company and it being ordered to be wound up, the amount due in relation to the funds mentioned in the said clauses and damages or any charges due from the employer in relation to the establishment so also in relation to an exempted establishment from the employer shall have priority in terms of Section 530.

43. This provision does not mean that the Liquidator becomes the employer. In any event, it only means that the amounts due from the employer in relation to the establishment as contributions towards scheme etc. shall, if the

liability therefor has accrued before the order of winding up, be deemed to be included under section 530 and paid in priority to all other debts. By relying upon this provision the applicant's case cannot be stretched to direct the Liquidator to make contribution in the fund after he takes charge. I am of the view that relying upon this provision the Liquidator cannot be called upon to make contributions for the period specified by the abovementioned provision on the basis that he is an employer, if the employer has defaulted in any payment thereof. More so, when he is not running the unit or factory.

44. The above provision of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 enables the applicant to take such proceedings as are provided thereunder against the employer and after an order is passed against him, any dues, charges etc. under that order, shall have priority. But that does not mean that this Court can proceed on the basis that the Liquidator is an employer, and, therefore, is obliged to make contributions, as prayed.

45. In the result, the company application

succeeds partly. There shall be an direction to re-adjudicate the claims of 21 workmen in accordance with law within a period of eight weeks from today. Thus, company application is made absolute in terms of prayer (b). The claim of the applicant union for payment of interest on Gratuity is rejected. So also the claim for bonus for the years 1994-95, 1995-96, 1996-97,. 1997-98. However, as far as Provident Fund contribution of the employer is concerned, the liquidator to take steps as directed above. There shall be no order as to costs.

46. In the light of the above discussion, it is not necessary to make a detailed reference to the decisions brought to my notice by Shri Engineer. In any event, I am in agreement with the learned Single Judge of Gujarat High Court insofar as his conclusion on payment of Bonus by the liquidator. The decision of Kerala High Court does not apply in the facts and circumstances of present case.

(S.C.DHARMADHIKARI, J.)